

JUL 31 2008

By M. B. [Signature]
Deputy

CE

1 Barry Melton
2 Yolo County Public Defender
3 State Bar No. 104700
4 814 North St.
5 Woodland CA 95695
6
7 Tel.: 530-666-8165
8
9 Attorney for Marco Topete

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11
12 IN AND FOR THE COUNTY OF YOLO

13 THE PEOPLE OF THE STATE OF
14 CALIFORNIA

NOS. 08-3355

15 Plaintiff,

MOTION FOR CONTINUANCE
OF CCP § 170.1 MOTION
MOTION

16 vs.

Date: 8/8/08

17 MARCO ANTONIO TOPETE,

Time: 1:30 p.m.

18 Defendant.

Dept.: Dept. 30, Superior Court
In and For the County of
Sacramento

19 PLEASE TAKE NOTICE that on August 8, 2008, at the hour of 1:30 p.m., or as
20 soon thereafter as the matter may be heard in Department 30 of the of the Superior Court
21 of the County of Sacramento, 720 Ninth Street, Sacramento, California 95814, the within
22 defendant, Marco Topete, will move the court for continuance of the above entitled cause.

23 This motion is brought on grounds that the undersigned counsel has filed a
24 declaration of conflict of interest in the above-entitled cause presently scheduled to be
25 heard at 8:30 a.m. in Department 9 of the above entitled court on August 1, 2008 and
26 (assuming present counsel's request to be relieved is granted), it is likely that either the
27 within defendant will have no legal representation on August 8th, or such counsel as may be
28 appointed to represent the within defendant will not have had sufficient time to receive the
the files and records of the defense and familiarize themselves with issues before the Court
on August 8, 2008.

1 This motion is based upon the Constitution of the United States including, but not
2 limited to the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments thereof and
3 related state constitutional provisions including, but not limited to, Article I, secs. 1, 2, 3,
4 6, 7, 9, 11, 12, 13, 14, 15, 16, 17, 24 and 26 of the Constitution of the State of California,
5 upon this notice of motion and the points and authorities and declaration attached hereto,
6 on all pleadings, records and files in this case, and upon such evidence, oral and
7 documentary, as may be adduced at the time and place scheduled for the making of the
8 motion.

9 Dated: 7/30/08



Barry Melton
Attorney for Marco Antonio Topete

12 MEMORANDUM OF POINTS AND AUTHORITIES

13 **I. BECAUSE THIS IS A CASE IN WHICH A DEATH SENTENCE MAY BE**
14 **IMPOSED, EXTRAORDINARY MEASURES ARE REQUIRED TO INSURE**
15 **THE RELIABILITY OF THE DECISION.**

16 This case is different from most and extra consideration must be taken when
17 deciding this motion. Mr. Topete is eligible to receive a death sentence in this case. "The
18 fundamental respect for humanity underlying the Eighth Amendment's prohibition against
19 cruel and unusual punishment gives rise to a special 'need for reliability in the
20 determination that death is the appropriate punishment' in any capital case." (*Johnson v.*
21 *Mississippi* (1988) 486 U.S. 578, 584 (citations omitted).) It is well established that when
22 a defendant's life is at stake, a court must be "particularly sensitive to insure that every
23 safeguard is observed." (*Gregg v. Georgia* (1976) 428 U.S. 153, 187.) This heightened
24 standard of reliability is "a natural consequence of the knowledge that execution is the most
25 irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*
26 (1986) 477 U.S. 399, 411.)

27 Death, in its finality, differs more from life imprisonment than a 100-year prison
28 term differs from one of only a year or two. Because of that qualitative difference,
there is a corresponding difference in the need for reliability in the determination
that death is the appropriate punishment in a specific case. (*Woodson v. North*

1 *Carolina* (1976) 428 U.S. 280, 305.)

2 The United States Supreme Court has repeatedly emphasized the principle that
3 because of the exceptional and irrevocable nature of the death penalty, "extraordinary
4 measures" are required by the Eighth Amendment of the United States Constitution to
5 ensure the reliability of decisions regarding both guilt and punishment in a capital trial.
6 (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 118, 102 S.Ct. 869, 71 L.Ed.2d 1
7 [O'Connor, J., concurring]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, 96
8 S.Ct. 2978, 49 L.Ed.2d 944; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358, 97 S.Ct.
9 1197, 51 L.Ed.2d 393; *Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 57
10 L.Ed.2d 973; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 100 S.Ct. 2382, 65 L.Ed.2d
11 392.)

12 **II. THE DEFENDANT IS ENTITLED TO A CONTINUANCE IF NECESSARY TO**
13 **PROTECT HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL**

14 The California Constitution, Article I, section 15 and the Sixth Amendment to the
15 Constitution of the United States provide a criminal defendant with the right to be
16 represented by counsel at trial. Inherent in this guarantee is the requirement that counsel
17 provide "diligent, substantial representation," not simply a pro forma appearance *People v.*
18 *Locklar* (1980) 84 Cal.App.3d 224, 229. As the California Supreme Court has stated, the
19 measuring standard is whether counsel has carried out his responsibilities as a "reasonably
20 competent attorney acting as a diligent, conscientious advocate." *People v. Pope* (1979) 23
21 Cal.3d 412, 424.

22 It is axiomatic that included in a defendant's right to counsel is the need for counsel
23 to be fully prepared to represent the defendant. A defendant is "entitled to effective
24 assistance of counsel, one aspect of which is the investigation and presentation of crucial
25 defenses." *Hughes v. Superior Court* (1980) 106 Cal.App.3d 1, 4.

26 Penal Code section 1050(e) states that "continuances shall be granted only upon a
27 showing of good cause." Good cause exists when a defendant in a criminal case is
28 represented by counsel who is unprepared for the proceeding sought to be continued.

1 In *Hughes v. Superior Court* (1980) 106 Cal.App.3d 1, a deputy public defender
2 was assigned two complex criminal trials involving attempted murders. Counsel "took a
3 chance" and prepared the older of the two cases for trial. However, at the prosecution's
4 insistence in order to accommodate a medically incapacitated out-of-town witness, the
5 unprepared case went to trial. After his requests for a continuance were denied, defense
6 counsel refused to participate in the trial on the basis that his unpreparedness would result
7 in his client's denial of a fair trial. Counsel was held in contempt of court. In setting aside
8 the contempt finding the Court of Appeal made several important observations relevant
9 here.

10 The *Hughes* court held: "Clearly petitioner's client was entitled to effective
11 assistance of counsel, one aspect of which is the investigation and presentation of crucial
12 defenses." (See *People v. Frierson* (1979) 25 Cal.3d 142, 159-160 [158 Cal.Rptr. 281,
13 599, P.2d 587]; *In re Sanders* (1970) 2 Cal.3d 1033, 1048-1049 [88 Cal. Rptr. 633 472
14 P.2d 921]; *People v. Corona* (1978) 80 Cal.App.3d 684, 705-719 [145 Cal.Rptr. 894]; *In*
15 *re Kubler* (1975) 53 Cal.App.3d 799, 805-806 [126 Cal.Rptr. 25]; *Brubaker v. Dickson*
16 (9th Cir. 1962) 310 F.2d 30, 38-39.) To force an unprepared counsel to proceed to trial
17 regardless of the reasons for the lack of preparedness would result in a violation of
18 constitutional rights. "[I]t is a denial of the accused's constitutional right to a fair trial to
19 force him to trial with such expedition as to deprive him of the effective aid and assistance
20 of counsel." (*White v. Ragen* (1945) 324 U.S. 760, 764 [89 L.Ed. 1348, 1352, 65 S.Ct
21 978]; see also *Powell v. Alabama* (1932) 287 U.S. 45, 49 [77 L.Ed. 158, 160-161, 53 S.Ct
22 55 84 A.L.R. 527]) If counsel had obeyed the court's order to proceed, his compliance
23 would have denied his client a fair trial. *Hughes v. Superior Court*, supra, at 3.)

24 *People v. Fontana* (1982) 139 Cal.App.3d 326, also involved a situation where the
25 trial court denied a motion for continuance and forced unprepared defense counsel to
26 proceed. The hearing there involved a violation of probation. After the "hearing" the trial
27 court found the defendant to be in violation, revoked probation, and sent the defendant to
28 prison.

1 While the determination of whether a continuance should be granted rests in the
2 discretion of a trial court, "that discretion may not be exercised in such a manner as to
3 deprive the defendant of reasonable opportunity to prepare his defense."

4 "That counsel for a defendant has a right to reasonable opportunity to prepare for a
5 trial is as fundamental as is the right to counsel" [Citations] (*Jennings v. Superior Court*
6 (1967) 66 Cal.2d 867, 875-87-6 [59 Cal.Rptr. 440, 428 P.2d 304]; accord *People v.*
7 *Maddox* (1967) 67 Cal.2d 647 652, [63 Cal.Rptr 371 433 P.2d 1635 Put plainly, when a
8 denial of a continuance impairs the fundamental rights of an accused" the trial court abuses
9 its discretion. (*People v. Locklar* (1978) 84 Cal.App.3d 224, 230 [148 Cal.Rptr. 322] By
10 denying a continuance to allow counsel to become prepared in the instant case" appellant's
11 right to the effective assistance of counsel and his right to confront and cross-examine the
12 sole adverse witness were denied even more effectively than by the process condemned in
13 [*People v. Winson* (1981)] 29 Cal.3d 711.

14 The trial court has a responsibility to ensure that a defendant in a criminal
15 case is in fact adequately represented by competent and prepared counsel. "Upon the trial
16 judge rests the duty of seeing that the trial is conducted with solicitude for the essential
17 rights of the accused." *Glasser v. United States* (1942) 315 U.S. 60, 71, 86 L.Ed. 680,
18 699.

19 "By allowing this defendant to proceed to trial without the assistance of counsel
20 when he had not affirmatively waived his right to such assistance, the court abrogated both
21 its duty to protect the rights of the accused and its duty to ensure a fair determination of the
22 issues on their merits. Furthermore, the court's action, rather than promoting actually
23 hindered the orderly administration of justice. By permitting such a proceeding to go
24 forward, the judge virtually assured an appeal, a reversal and a future retrial, thereby placing
25 an unnecessary additional strain on the already over-burdened judicial system." (*People v.*
26 *McKenzie* (1983) 34 Cal.3d 616; 627.)

27 As the United States Supreme Court has stated, "[A] myopic insistence upon
28 expeditiousness in the face of a justifiable request for delay can render the right to defend

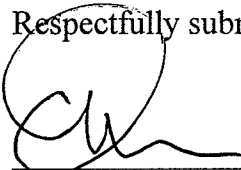
1 with counsel an empty formality." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589, 11
2 L.Ed.2d 921, 931, 84 S.Ct. 841.)

3 **III. CONCLUSION**

4 Here, defendant's counsel is seeking to withdraw due to a conflict of interest, yet at
5 the time the conflict of interest is being declared, the defendant a critical stage of
6 defendant's proceedings is set for hearing before the Hon. David F. De Alba in the Superior
7 Court of the County of Sacramento. Under these circumstances, it is urged that a
8 continuance is necessary and proper to secure the defendant's right to counsel at all critical
9 stages of his proceedings.

10 Dated: 7/30/08

12 Respectfully submitted,



14 Barry Melton
15 Attorney for Marco Topete

16 **DECLARATION OF BARRY MELTON**

17 I, Barry Melton, say:

18 1. I am an active member of the State Bar of California; my business address and
19 telephone number are first above written, and I am the attorney for the within defendant,
20 Marco Topete.

21 2. I make this declaration in support of the foregoing motion for continuance.

22 3. Mr. Topete's case is set for hearing on his motion to recuse the Hon. David
23 Rosenberg, Judge of the Yolo County Superior Court, pursuant to Code of Civil Procedure
24 § 170.1, and said motion is set to be heard by the Hon. David F. De Alba, Judge of the
25 Superior Court, County of Sacramento, on August 8, 2008.

26 4. I have declared a conflict of interest in Mr. Topete's case and requested to be
27 relieved as his counsel; that matter is set to be heard in the Yolo County Superior Court on
28 August 1, 2008, in Department 9 of said Court at 8:30 a.m.

1 5. It is not clear at this time as to whether or not the Court will be able to appoint
2 counsel for Mr. Topete on August 1, presuming I am relieved as his counsel; indeed, even if
3 appointment of new counsel is possible on August 1st, I am informed and believe the
4 volume of material relating to the hearing presently set before Judge De Alba is
5 sufficiently large that it will be impossible to fully inform new counsel to to the extent that
6 new counsel would be sufficiently apprised of all issues and evidence as may be relevant to
7 the proceeding set before Judge De Alba in sufficient time to assure effective
8 representation of the defendant at said proceeding.

9 I declare, under penalty of perjury under the laws of the State of California that the
10 foregoing is true and correct.

11 Executed this 30th day of July 2008, at Woodland, California.

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15 Barry Melton
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PROOF OF SERVICE

I, Kara McKay, say:

I am over the age of 18 years, a citizen of the United States of America and I am employed at the Yolo County Public Defender's Office at the address (and telephone number) first above written.

I served a true copy of the "Declaration Re: Conflict of Interest," as executed and filed in this Court on July 29, 2008, in the manner stated below and on the following parties. **PLEASE TAKE NOTICE THAT THE HEARING ON THE MATTER IS STATED ON THE SAID DECLARATION, ETC., AND SUBSCRIBED BY THE HON. STEPHEN MOCK, JUDGE, TO WIT, THE HEARING IS SET ON AUGUST 1, 2008, AT 1:30 P.M., IN DEPARTMENT 3 OF THE ABOVE-ENTITLED COURT:**

I served the aforesaid Declaration, etc., on
Jeff Reisig, District Attorney
301 Second Street
Woodland, CA 95695

by hand delivering same to him at the address aforesaid on the date hereinbelow indicated.

I further served true copies of the "Declaration Re: Conflict of Interest," as executed

and filed in this Court on July 29, 2008, on the following:

1. Robyn Drivon, County Counsel
2. Jay Toney, Conflicts Panel Administrator

by depositing copies of same in the boxes maintained by each of said persons in the Yolo County Courthouse, 725 Court Street, Woodland, CA 95695 on the date hereinbelow indicated.

Finally, the following parties were served, at their respective addresses indicated below, with the "Declaration Re: Conflict of Interest," as executed and filed in this Court on July 29, 2008:

Hon. David De Alba
Dept. 30
Sacramento Superior Court
720 Ninth Street

1 Sacramento, CA 95814

2 via Federal Express, overnight delivery; and finally upon

3 Marco Antonio Topete
X-2875786 - 8W221A

4 Sacramento County Main Jail
651 "I" Street

5 Sacramento, CA 95814

6 by depositing the same in a sealed envelope separately addressed to him as aforesaid.

7 with first class postage fully prepaid thereon, and thereafter depositing same in the U.S.

8 mails at Woodland, California on the date below indicated.

9 I declare, under penalty of perjury, that the foregoing is true and correct.

10 Executed this 30th day of July 2008 at Woodland, California

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12 Kara McKay
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